

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

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In the Matter of	)	
	)	
Rules and Regulations Implementing the	)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991	)	
	)	
Junk Fax Prevention Act of 2005	)	CG Docket No. 05-338
	)	

**TO: The Commission**

**REPLY COMMENTS OF THE  
NATIONAL ASSOCIATION OF REALTORS®**

The National Association of REALTORS® (“NAR”) agrees with the comments filed in this proceeding urging the Commission to adopt regulations implementing the Junk Fax Prevention Act of 2005 (“JFPA”)<sup>1</sup> that are clear, modest in their scope, and readily understandable.<sup>2</sup> NAR, which represents more than 1,200,000 real estate professionals engaged in all aspects of the residential and commercial real estate business, as well as some 1500 state and local associations of REALTORS®, files these Reply Comments to emphasize several key implementation issues that are of particular importance to real estate professionals.

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<sup>1</sup> Pub. L. No. 109-21, 119 Stat. 359 (2005). The JFPA amended the Telephone Consumer Protection Act of 1991 (“TCPA”), 47 U.S.C. § 227.

<sup>2</sup> Comments of the American Bankers Association, CG Docket No. 05-338, at 6 (filed Jan. 18, 2006); Comments of the National Association of Wholesaler-Distributors, CG Docket No. 05-338, at 14 (filed Jan. 18, 2006); Comments of the Yellow Pages Association, CG Docket Nos. 02-278 & 05-338, at 8 (filed Jan. 18, 2006).

**I. THE RULE SHOULD RECOGNIZE THE VALIDITY OF FAXES SENT IN THE CONTEXT OF INFORMAL BUSINESS RELATIONSHIPS.**

As commenters emphasized, Congress adopted the JFPA in large part to abrogate the Commission's requirement that a recipient of a fax must provide a "signed, written statement" to manifest the recipient's "prior express invitation or permission" to send a fax.<sup>3</sup> The "signed, written statement" requirement, which has been stayed since August 2003, has been the subject of intense criticism since it was adopted. NAR, along with many others, opposed it immediately and filed a Petition for Reconsideration.<sup>4</sup> In substance, NAR opposed this requirement because it imposed an enormous burden on fax senders that was both unreasonable and unnecessary.<sup>5</sup>

The majority of NAR's members are small businesses or self-employed professionals without the resources to launch large-scale campaigns for "signed, written statements." Moreover, customers' relationships with real estate professionals are often informal arrangements. It would be unreasonably burdensome to clients' relationships with real estate professionals if the professionals were required to obtain prior written permission before any material could be faxed to the client.

NAR generally agrees with the Commission's conclusion that the "prior express invitation or permission" provision is unnecessary and should be abandoned. NAR cautions, however, that elimination of this provision is only appropriate if the

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<sup>3</sup> The JFPA, at Section 2(g), amends the consent requirement in Section 227(a)(5) to add the words "in writing or otherwise."

<sup>4</sup> National Ass'n of REALTORS®, Petition for Recon., *Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278 (filed Aug. 25, 2003) ("NAR Petition"). See generally *Petitions for Reconsideration & Clarification of Action in Rulemaking Proceeding*, Public Notice, Report No. 2627, CG Docket No. 02-278 (rel. Sep. 8, 2003).

<sup>5</sup> NAR Petition at 8.

Commission adopts a definition of “established business relationship” that is broad enough to encompass relationships between real estate professionals and their clients, and other informal business relationships. If the Commission adopts a narrower EBR definition that excludes these relationships, then it is critical that senders have some mechanism for obtaining “prior express invitation or permission” to legally send a fax to their customers. In that event, the Commission should provide for alternative means of obtaining prior express consent. It bears emphasis that NAR and other parties have petitions for reconsideration pending in this proceeding that, if granted, would resolve many of the attendant issues.

## **II. THE COMMISSION SHOULD IMPLEMENT EXEMPTIONS FOR SMALL BUSINESSES AND NON-PROFITS.**

NAR explained in its Comments the importance of the Commission’s proposals to exempt small businesses from the requirement to provide a “cost-free” mechanism for communicating opt-outs, and to exempt non-profits from the opt-out notice provisions of its rule.<sup>6</sup> Both of these exemptions are important ways to ensure that the burdens associated with rule compliance do not fall on those fax senders that are least likely to abuse fax communications, but most susceptible to increased compliance costs.

### **A. Small Businesses**

NAR supports the Commission’s proposal that small businesses should be exempt from providing a “cost-free” mechanism by which recipients can communicate their opt-out preferences.<sup>7</sup> In comments filed in this proceeding, the United States Small

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<sup>6</sup> Comments of the National Ass’n of REALTORS®, CG Docket Nos. 02-278 & 05-338, at 9-11, 15-16 (filed Jan. 18, 2006) (“NAR Comments”).

<sup>7</sup> *Id.* at 9-11.

Business Administration's Office of Advocacy encouraged the Commission to adopt a small business exemption and to define a small business as one with 100 or fewer employees.<sup>8</sup> NAR acknowledges the Small Business Administration's expertise in this area and encourages the Commission to adopt its recommendation.

Certain other commenters oppose a small business exemption, claiming that the exemption would increase costs for recipients, and noting that "many of those most severely affected by [spam fax marketing] are themselves small or home-based businesses."<sup>9</sup> These few commenters – none of whom are themselves small businesses – surely cannot be heard to argue that they, and not the scores of organizations that, like NAR and the National Federation of Independent Businesses, actually represent small businesses, know what is best for small businesses. The response from the small business community has been resounding: Small businesses favor avoiding unwarranted impediments on their businesses.<sup>10</sup>

Others claim that the costs associated with providing a "cost-free mechanism" are negligible and that small businesses should therefore be forced to incur

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<sup>8</sup> Comments of the Office of Advocacy, United States Small Business Admin., CG Docket Nos. 02-278 & 05-338, at 5 (filed Jan. 18, 2006).

<sup>9</sup> Comments of the Attorneys General of Arkansas, Connecticut, Kentucky and New Mexico, CG Docket Nos. 02-278 & 05-338, at 24 (filed Jan. 18, 2006) ("Attorneys General Comments").

<sup>10</sup> Comments of American Society of Association Executives, CG Docket Nos. 02-278 & 05-338, at 5-6 (filed Jan. 18, 2006); Comments of the International Foodservice Distributors Association, CG Docket No. 05-338 (filed Jan. 18, 2006), at 4; NAR Comments at 9-10; Comments of National Automobile Dealers Association, CG Docket No. 05-338, at 3 (filed Jan. 18, 2006) ("NADA Comments"); Comments of National Federation of Independent Business, CG Docket Nos. 02-278 & 05-338, at 6 (filed Jan. 18, 2006) ("NFIB Comments"); Comments of the National Newspaper Association and Newspaper Association of America, CG Docket No. 05-338, at 14-15 (filed Jan. 18, 2006) ("NNA/NAA Comments"); SAB Comments at 8; Comments of the Mortgage Finance Coalition, CG Docket Nos. 02-278 & 05-338, at 15 ("MFC Comments").

them.<sup>11</sup> For many reasons, small businesses disagree that these costs are small.<sup>12</sup> Among these reasons is the fact that, if a small business provides a toll-free telephone number, customers will automatically use it for all business communications, not merely those related to opt-outs.<sup>13</sup> Therefore, even if no customer ever actually opts-out, small businesses will be forced to bear the costs of establishing a toll-free number and the costs of using it for a significant number of their business-related telephone calls.

Moreover, small businesses often operate out of homes that have limited telephone capacity. If a real estate professional working out of his house already has a home telephone line, DSL Internet service, a business telephone line, and a fax line, the costs associated with adding an additional telephone line to handle opt-outs would likewise be substantial.<sup>14</sup>

#### **B. Non-Profits**

Similarly, it is appropriate to exempt non-profit organizations from the opt-out notice provisions of the rule because the rule's purposes would not be appreciably furthered by imposing this additional obligation on non-profits.<sup>15</sup> As NAR noted in its

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<sup>11</sup> Comments of Robert Biggerstaff, CG Docket No. 05-338, at 26 (filed Jan. 9, 2006); Comments of Wayne G. Strang, CG Docket No. 05-338, at 8-9 (filed Jan. 6, 2006).

<sup>12</sup> ASAE Comments at 7; Comments of the American Society of Travel Agents, Inc., CG Docket Nos. 02-278 & 05-338, at 10-11 (filed Jan. 18, 2006); NAR Comments at 12; NFIB Comments at 5, 6; Comments of the National Multi Housing Council, CG Docket Nos. 02-278 & 05-338, at 2 (filed Jan. 18, 2006); NNA/NAA Comments at 13; SAB Comments at 8-9; MFC Comments at 15.

<sup>13</sup> See NAR Comments at 10.

<sup>14</sup> *Id.*

<sup>15</sup> The Attorneys General noted that the Commission did not define "professional or trade association" in its NPRM. Attorneys General Comments at 27. That fact is insignificant because there is no real dispute about what organizations fall within this definition. Although precise wording may differ, generally accepted sources agree that a trade

comments, the Commission has never issued a citation or forfeiture notice to a professional or trade association, and has issued a citation only once to a non-profit.<sup>16</sup> Professional and trade associations, like other non-profits, enjoy a unique and special relationship with their members that is often significantly different from relationships with for-profit businesses.<sup>17</sup> Individuals and businesses that pay to belong to a professional or trade association or other non-profit are interested in and, indeed, *expect* access to the information provided by the organization.<sup>18</sup>

One commenter claims that, without an opt-out notice, members of non-profits might not be aware that they have the right to opt-out.<sup>19</sup> NAR's experience, and the experience of other non-profit trade associations,<sup>20</sup> does not support this conclusion. Members generally view access to faxed information as a benefit of membership; they also know how to reach the organization if they decide that they no longer want to receive that particular benefit.

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association is [1] an association [2] of persons or organizations [3] in the same trade or industry [4] formed for mutually beneficial purposes. *See, e.g.*, Black's Law Dictionary, 8th ed. (Thomson West, 2004); Ballentine's Law Dictionary (Reed Elsevier, 1969); Trade Ass'ns of the United States (U.S. Dep't of Commerce, 1949).

<sup>16</sup> NAR Comments at 15 (reviewing citations dating back to 1999 and posted on FCC's web site).

<sup>17</sup> *See, e.g.*, Comments of the Security Industry Ass'n, CG Docket Nos. 02-278 & 05-338, at 7 (filed Jan. 18, 2006).

<sup>18</sup> *See, e.g.*, Comments of National Automobile Dealers Ass'n, CG Docket Nos. 02-278 & 05-338, at 4 (filed Jan. 18, 2006).

<sup>19</sup> Comments of Lorman Educ. Servs., CG Docket Nos. 02-278 & 05-338, at 18-19 (filed Jan. 18, 2006).

<sup>20</sup> *See, e.g.*, Comments of the American Bar Association, CG Docket Nos. 02-278 & 05-338, at 2-3 (filed Jan. 18, 2006); NADA Comments at 4.

**III. THE ESTABLISHED BUSINESS RELATIONSHIP SHOULD BE DEFINED BROADLY TO INCLUDE BUSINESS RELATIONSHIPS THAT DO NOT INCLUDE A FORMAL CONTRACT.**

As described above, real estate professionals often interact with clients on an informal basis. According to recent NAR survey of consumers, nearly 50 percent of homebuyers have informal relationships with their real estate agent. While it is often the case that the homebuyer and real estate agent do not formalize their relationship until a sales contract is written, the parties enjoy a long period of extended communication and discussion in preparation for a transaction. During this extended period, an agent might fax a client a series of listings or detailed information about available properties. The real estate agent might, for instance, know that an individual with whom she has worked in the past has an interest in certain properties; when a relevant property becomes available, the agent would fax her listing to the client.

Contacts between real estate professionals and their clients are important and long-lasting, but as indicated, typically not formal. The Attorneys General propose that the Commission “limit the EBR to only those advertisers with whom the recipient has entered into a contract or from whom the recipient has purchased goods or services, or in the event there is no completed contract or transaction, who have received an application or inquiry from the recipient.”<sup>21</sup> This definition ignores how everyday business works and would omit most established business relationships between real estate professionals and their clients.

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<sup>21</sup> Attorneys General Comments at 8-9.

As explained in its Comments in this proceeding, NAR supports the Commission's proposed definition of the established business relationship.<sup>22</sup> That definition is broad enough to encompass virtually all legitimate business relationships that Congress intended to include within the EBR, but is also likely to exclude from the definition malicious senders of unsolicited commercial faxes that Congress targeted in the TCPA and the JFPA.

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For these reasons, the Commission should: (1) eliminate its "prior express invitation or permission" requirement; (2) exempt small businesses from the "cost-free mechanism" requirement and exempt non-profits from opt-out notice obligations; and (3) adopt the Commission's proposed definition of the established business relationship, and not a more narrow definition urged by other commenters.

Respectfully submitted,

  
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<sup>22</sup> NAR Comments at 5.